



EX PARTE OR LATE FILED

Qwest  
607 14<sup>th</sup> Street NW, Suite 950  
Washington, DC 20005  
Phone 202.429.3121  
Fax 202.293.0561

Cronan O'Connell  
Vice President-Federal Regulatory

**REDACTED**

August 30, 2005

**ORIGINAL**

**EX PARTE**

**RECEIVED**

AUG 30 2005

Federal Communications Commission  
Office of Secretary

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
Room TW B-204  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: *In the Matter of Petition of Qwest Corporation for Forbearance  
Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan  
Statistical Area – WC Docket No. 04-223*

Dear Ms. Dortch:

Qwest Corporation herein responds to the August 22, 2005 Cox Communications, Inc. ex parte in the above-captioned proceeding.

In this **REDACTED** version of the attached **Ex Parte Memorandum** the confidential material (on pages 2, 3 and 4) has been blacked out and the map for which confidential treatment has been requested has been removed. As well, all pages of the **Ex Parte Memorandum** have been denoted as **REDACTED**. Included are an original and four copies of this letter and the redacted **Ex Parte Memorandum**. The confidential version of the **Ex Parte Memorandum** is being filed today, via hand delivery, under separate cover.

This ex parte is being filed pursuant to 47 C.F.R. § 1.1206(b).

A fifth copy of this letter is being provided, for which acknowledgment is requested. Please date-stamp the copy and return it to the courier. If you have any questions regarding this submission, please contact the undersigned at the contact information reflected in the letterhead. Thank you for your assistance with this matter.

Sincerely,

*Cronan O'Connell / LEC*

Attachment

No. of Copies rec'd 5  
List A B C D E

Ms. Marlene H. Dortch  
August 30, 2005

Page 2 of 2

cc: Michelle Carey ([Michelle.Carey@fcc.gov](mailto:Michelle.Carey@fcc.gov))  
Russell Hanser ([Russ.Hanser@fcc.gov](mailto:Russ.Hanser@fcc.gov))  
Scott Bergmann ([Scott.Bergmann@fcc.gov](mailto:Scott.Bergmann@fcc.gov))  
Jessica Rosenworcel ([Jessica.Rosenworcel@fcc.gov](mailto:Jessica.Rosenworcel@fcc.gov))  
Thomas Navin ([Thomas.Navin@fcc.gov](mailto:Thomas.Navin@fcc.gov))  
Ian Dillner ([Ian.Dillner@fcc.gov](mailto:Ian.Dillner@fcc.gov))  
Julie Veach ([Julie.Veach@fcc.gov](mailto:Julie.Veach@fcc.gov))  
Jeremy Miller ([Jeremy.Miller@fcc.gov](mailto:Jeremy.Miller@fcc.gov))



Qwest  
1801 California Street, 10<sup>th</sup> Floor  
Denver, Colorado 80202  
Phone 303 383-6650  
Facsimile 303 896-1107

Robert B. McKenna  
Associate General Counsel

REDACTED

## EX PARTE MEMORANDUM

**DATE:** August 30, 2005

**RE:** Qwest Corporation Petition for Forbearance—WC Docket No.  
04-223, Analysis of Cox August 22, 2005 *Ex Parte*

On August 22, 2005, Cox Communications, Inc. ("Cox") filed an additional *ex parte* presentation opposing Qwest's request for forbearance from incumbent local exchange carrier ("ILEC") regulation in the Omaha Metropolitan Statistical Area's ("MSA's") telecommunications market. This *ex parte* presentation, especially when read together with the presentations that Cox filed on June 30, August 12 and August 23, 2005, demonstrates that Cox's "need" for continued regulation of Qwest Corporation ("Qwest") as an ILEC simply has no basis in reality.

Essentially, despite the fact that Cox is the dominant player in the Omaha market, and despite the fact that Cox has achieved this position without substantial (if any) reliance on rights or opportunities derived from Qwest's ILEC status, Cox is claiming that its ability to compete with Qwest in Omaha will be severely curtailed if Cox and Qwest are subject to the same regulations. There is a fundamental contradiction in Cox's position.

It is simply impossible for Cox to sustain the dual position that while it has never used Qwest's facilities based on Qwest's ILEC status,<sup>1</sup> with the exception of collocation in two Qwest offices, Cox will not be able to compete unless it has unlimited access to Qwest's unbundled network elements ("UNEs") at Total Element Long Run Incremental Cost ("TELRIC") prices for the indefinite future. Viewed in light of Cox's public claims that it provides full service (including OC service up to OC-192) throughout Omaha<sup>2</sup> and its admission that Qwest does not possess

<sup>1</sup> Cox does claim that it makes extensive use of collocation rights, albeit in only two Qwest offices. Cox has made no serious effort to demonstrate that its ability to interconnect with Qwest's network would be jeopardized if Cox and Qwest were to determine the location of such interconnection points based on good faith negotiations.

<sup>2</sup> See Qwest July 27, 2005 *ex parte* presentation at Tab 16. Therein, Qwest demonstrated that Cox claims to provide, among other things, "Cable modem speeds to 786Kbps/6.0Mbps. T-1 speeds (1.5 Mbps) of internet. OC 48 to OC-192 Bandwidth. Ethernet over Sonet (EOS) scalable to 100Mbps." Private line services, including: "DS-1, DS-3, Ethernet over Sonet (EOS), Virtual Private Network (VPN) and local loop connectivity to IXC's." In this regard, Cox boasts of

market power in the Omaha "retail" market,<sup>3</sup> it is obvious that Cox's position is seriously flawed. One of these claims or the other is wrong. They cannot both be true.

We examine here three *ex parte* presentations submitted by Cox in which it alleges a "need" for Section 251(c) services and facilities from Qwest.

#### **Cox's "Geographic Coverage" Claims:**

In Cox's June 30, 2005 *ex parte* presentation, Cox asserts that it has only "partial coverage" of many Qwest wire centers serviced by Cox. Cox's assertions are misleading.

This "partial coverage," which Cox describes as "geographic coverage of the wire centers it serves in the Omaha MSA," shows the eighteen wire centers in which Cox states that it provides service, with a "percentage served" number assigned to each wire center. The "percentage served" includes "fully served" for [REDACTED] other wire centers; "75 to 95 percent served" for [REDACTED] wire centers; "40 to 60 percent served" for [REDACTED] others; and "10 to 30 percent served" for [REDACTED] wire centers. For illustrative purposes, we focus on two of the "10 to 30 percent served" rate centers -- both of which are in [REDACTED].

In analyzing [REDACTED], it must be remembered that Cox clearly does not serve "10 to 30 percent" of the population within its franchised cable territories. As the incumbent cable television monopoly, Cox has agreed to build-out requirements with local governments as part of its franchise obligations. It is very unlikely that these commitments would permit Cox to serve only 10 percent of the potential customers in [REDACTED] or other franchise communities.<sup>4</sup>

The phrase "geographic coverage" must therefore refer to the percentage of the land area that Cox covers in a particular wire center, rather than the number of customers or potential customers that it serves in these wire centers. This would mean that Cox's geographic service area claims are based on inclusion of areas within wire centers where few or no people live or work.

A map of the [REDACTED] wire centers is attached hereto as Attachment A. Based on this map, Cox may be correct that on a "geographic basis," the [REDACTED] wire centers are only "10 to 30 percent served." But that is true only because 10 to 30 percent of the geographic areas of these wire centers possess buildings requiring telephone service; the remainder of the geographic area includes unpopulated areas for which no service is required or more sparsely populated areas where build out by any provider is necessary in order to provide service. In fact,

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providing service to twenty-two of the largest businesses in Omaha, and to owning a multi-layered fiber ring connecting eight major hubs in Omaha. *Id.*

<sup>3</sup> See Cox August 23, 2005 *ex parte* (p.2 of attachment).

<sup>4</sup> As far as Qwest can determine, Cox's franchise encompasses 80 percent of the geographic area within the area identified as the [REDACTED] wire centers.

Qwest currently has DS1 and DS3 facilities in less than 45 percent of the geographic area of the [REDACTED] wire center and just 30 percent of the area of the [REDACTED] wire center.

It is therefore clear that Cox's "service" coverage figures cannot serve as a metric for the level of competition in Qwest's individual wire centers. The proper percentages would measure Cox's service to locations where people live and work. In contrast, Cox's claim that its service is somehow limited because it serves only significant population clusters within its cable franchise areas is not meaningful.

#### **Cox's "Need" for DS1 and DS3 Facilities as UNEs:**

In its August 22, 2005 *ex parte*, Cox outlines its "need" for Qwest's unbundled DS1 and DS3 facilities at below-tariff rates. To paraphrase Cox's argument, it appears that Cox's claim is based on the following:

From its own research, Cox has found [REDACTED] businesses in Omaha that potentially could purchase service at DS1 or higher speeds. But Cox cannot serve more than [REDACTED] of these customers without constructing its own facilities.

[REDACTED] Cox will use unbundled network elements from Qwest to serve some of these customers "under certain circumstances." This service arrangement will represent less than [REDACTED] percent of Cox's current service to the business market.

Apparently Cox feels that this showing is sufficient grounds to justify denial of Qwest's forbearance petition. Cox continues to assert that it truly needs high-capacity loop and transport UNEs from Qwest even though it purchases no such UNEs today.<sup>5</sup> [REDACTED]

[REDACTED] In other words, Cox believes that its business plan should control the type of relief available to Qwest. Such a belief, however, finds no basis in the Act or any Commission rule or policy.

A key part of Cox's claim is its estimate that there are approximately [REDACTED] customers that "potentially could purchase service at the DS-1 level or higher" that Cox believes that it can serve. Cox declines to identify where these customers are located, but states that it "has the capability of using its own facilities to serve approximately [REDACTED] of the [REDACTED] customers" thus identified.<sup>6</sup> Cox also declines to identify just how much construction would be required for it to

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<sup>5</sup> Cox does claim that it purchases copper facilities from Qwest. See Cox June 30, 2005 *ex parte* at 3. As far as Qwest can determine, these purchases consist of tariffed special access (DS1) facilities services.

<sup>6</sup> The implication of this allegation by Cox appears to be that Qwest is ready to serve these [REDACTED] customers with DS1 service using its own existing facilities. This is of course a false conclusion. While it is obviously impossible for Qwest to determine where its facilities lie in relation to

bring service to these customers (and does not even attempt to demonstrate how these customers might be served using alternatives to the UNE loops that Cox seems to claim are necessary for it to provide service). Nor does Cox claim that it would be uneconomical or wasteful to upgrade its own facilities to serve these customers. Given the ready adaptability of cable plant to DS1 and higher service, these are clearly relevant questions to establishing a true need for Qwest's facilities.

Ultimately, what Cox's position comes down to is convenience. As noted above, Cox states that it may need UNEs from Qwest because [REDACTED]

[REDACTED] This is the nub of Cox's position: given the opportunity to serve customers through construction of its own facilities, [REDACTED], and instead wants the option to obtain these facilities from Qwest at the lowest possible cost. But as the Supreme Court found in the *Iowa Utilities Board* case, business convenience is not an appropriate factor under Section 251(d)(2)(B)'s impairment test,<sup>7</sup> and should similarly have no application in a forbearance petition. Accordingly, Cox's refusal to make these capital expenditures does not provide a basis on which to deny Qwest's forbearance petition.

#### **Cox's Demands to Continue Using Qwest's Network on ILEC Terms:**

Cox's August 12, 2005 *ex parte* takes a different tack. In this filing, Cox claims it would lose key interconnection rights unless the Commission requires Qwest to continue offering these facilities to Cox as an ILEC. Cox does not elaborate on what it means by "key interconnection rights." If Qwest were regulated as a competitive local exchange carrier ("CLEC") rather than as an ILEC, the obligations of "negotiation in good faith" and "interconnection" apply to CLECs as well as to ILECs.<sup>8</sup> Qwest has detailed the list of regulatory obligations that will remain after the grant of its forbearance petition. Grant of Qwest's forbearance petition will bring regulatory parity between Qwest and Cox.

This filing brings some clarity to what Cox is actually demanding from Qwest, however. Cox is claiming that the right to use Qwest as a transiting carrier is the key to Cox's opposition to

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unidentified customers or potential customers, it is reasonable in Omaha for Qwest to be able to provide immediate DS1 service to less than 20 percent of customers who desire it for the first time without further construction or modification of Qwest's network. In the case of small business customers, who apparently make up the bulk of the customers not identified by Cox, this number would be considerably lower.

<sup>7</sup> See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388-92 (1998).

<sup>8</sup> See Qwest's *ex parte* presentation of July 25, 2005 for a list of regulatory obligations that will remain after grant of Qwest's forbearance petition. It should be noted that, in that presentation, Qwest had assumed that all ILEC obligations would be removed from Qwest, but that Qwest would still need to file non-dominant carrier tariffs. If Qwest's petition for forbearance from dominant carrier regulation is also granted, Qwest would not need to file tariffs, but would still be subject to all of the rules and laws that govern non-dominant carriers, including Cox.

Qwest's forbearance petition -- presumably, the right to purchase transiting service at TELRIC rates. But transiting is not an ILEC obligation under Section 251(c) of the Act. In any case, Cox has never had a right nor does it have that right to demand TELRIC pricing for transiting even if Qwest continues to be regulated as an ILEC.<sup>9</sup>

In turn, Cox's June 30, 2005 *ex parte* presentation presents a different view of competition, making two claims that merit some attention:

First, Cox claims that it "does not have full access to MTEs in the Omaha MSA," and that it ostensibly needs access to Qwest facilities in order to serve these MTEs. Cox estimates this number of MTEs to which Cox does not have "full access" to range between 8,000 and 9,000, but Cox provides no explanation as to why it does not have such "full access" or, more importantly, what "full access" means. As the franchised cable television monopoly in Omaha, Cox presumably has access into these MTEs for the provision of cable television service. Yet Cox offers no explanation for this apparent contradiction. Even if Cox's claim is that its "full access" is somehow limited by MTE owners restricting Cox from providing service, absent some details of what Cox is claiming, and some analysis as to why Cox cannot serve customers economically via Qwest's existing tariffed services or resale of Qwest's services, these claims must be rejected.<sup>10</sup>

Second, Cox claims that upon being granted non-dominant status, Qwest will simply stop interconnecting with Cox, withdraw all of its tariffs, and cease complying with the federal rules regarding common carriage and LEC operation under Sections 201, 202 and 251(b) of the Act. As Qwest has pointed out on numerous occasions in the past,<sup>11</sup> this assumption is not only false but is inconsistent with the law.

In short, Cox's asserted need for Qwest's facilities under Section 251(c) of the Act is unsupported. Cox has shown that the only 251(c) service it purchases today is collocation in two Qwest offices for the purpose of interconnection, and has made no attempt to explain why it could not interconnect with Qwest through an alternative means. Cox's claim for access to UNEs is even more far-fetched, as Cox does not purchase such elements today and its purported need is non-existent. Cox has failed to demonstrate why Qwest's forbearance petition should be denied.

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<sup>9</sup> See *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 17 FCC Rcd 27039, 27100 ¶ 115, 27101 ¶ 117 (2002) (approving non-TELRIC rates and stating, "we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates.").

<sup>10</sup> Section 251(b)(1), requiring LECs to allow for the resale of their telecommunications services, is not affected by the Qwest forbearance petition.

<sup>11</sup> See Qwest's July 25, 2005 *ex parte* memorandum at 1-3.

ATTACHMENT

**REDACTED**